

John L. Carmichael of Wichita, Kansas, appeared for the claimant. William L. Townsley, III, of Wichita, Kansas, appeared for the respondent and its insurance carrier. E. L. Lee Kinch of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board was the transcript of the settlement hearing held on February 20, 1996, and the transcript of the hearing held before Administrative Law Judge John D. Clark on September 19, 1996.

ISSUES

The Administrative Law Judge denied claimant's request for penalties. The Administrative Law Judge did not address claimant's request for attorney fees. Claimant requested this review and asked the Appeals Board to review the issues of (1) claimant's entitlement to penalties, and (2) claimant's entitlement to an award for attorney fees. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record, the Appeals Board finds as follows:

The Order entered by the Administrative Law Judge should be modified to award claimant attorney fees in the sum of \$250.

(1) In a settlement hearing conducted before Special Administrative Law Judge James R. Roth, the parties entered into an agreed award on February 20, 1996. At that hearing the respondent and its insurance carrier agreed to pay any unpaid, authorized, and related medical expenses which were incurred on or before that date. The Special Administrative Law Judge incorporated that agreement into the award. Sometime after the hearing, claimant requested payment of an \$1,800 bill incurred with Saint Francis Hospital of Tulsa, Oklahoma, and reimbursement of funds which claimant allegedly expended to purchase prescribed medications. When respondent refused payment, claimant brought this proceeding to request penalties pursuant to K.S.A. 44-512a. At the penalties hearing, claimant also requested an order of reimbursement and payment of the outstanding expenses in question.

The Administrative Law Judge properly denied claimant's request for penalties. The medical expenses in question have never been ordered paid and are disputed. Under the terms of the award entered at the settlement hearing, respondent was obligated for only that medical expense which (1) was authorized by the treating physician or one of his/her referrals, (2) was related to claimant's October 3, 1992, work-related accident, and (3) was outstanding as of February 20, 1996.

Because the \$1,800 medical bill was incurred for a sleep study for sleep apnea problems, respondent contested its relationship to the work-related accident. Respondent also questioned whether claimant had incurred out-of-pocket expenses in the sum of

\$139.50 to purchase a prescription of Caverject or \$86.50 to purchase a prescription of Prozac. Additionally, respondent questioned whether claimant was entitled to reimbursement of \$60 which was allegedly credited to his pharmacy account on the date after the settlement hearing.

The issues raised by the respondent were valid and had not been previously presented to an administrative law judge for a determination. Without an initial determination that those contested medical expenses were respondent's obligation and ordered paid, the request for penalties was premature.

The Administrative Law Judge was correct in refusing to order respondent to pay the medical expenses in question. Based upon the evidence presented, the Appeals Board finds that the medical expense incurred with Saint Francis Hospital for the sleep study is not respondent's obligation. The record fails to link claimant's sleep apnea problems to the work-related accident. The Appeals Board also finds the evidence fails to establish that claimant incurred out-of-pocket prescription expense that is respondent's obligation. An itemized statement from the Plemons Pharmacy where claimant allegedly purchased his medications is notably absent from the evidentiary record. Claimant is unable to accurately recall certain facts concerning the Caverject prescription and unable to provide a receipt or canceled check evidencing payment. Likewise, claimant failed to present either an actual receipt or canceled check to substantiate purchase of the prescription of Prozac which he contends occurred on or before the February 20, 1996, cutoff date. Finally, the evidence fails to establish whether the \$60 payment claimant made to the pharmacy on February 21, 1996, the day after the settlement hearing, was credited to expenses which were respondent's obligation.

(2) Because claimant's entitlement to the medical expenses in question which were incurred before February 20, 1996, involved issues which existed before the award was entered at settlement hearing, those issues cannot be considered as post-award matters justifying the assessment of attorney fees under K.S.A. 44-536(g). However, the attempt to obtain payment for the medical expenses allegedly expended for a drug prescription on February 20, 1996, and for reimbursement of the amount paid on claimant's pharmacy account are post-award matters contemplated by K.S.A. 44-536(g).

Considering the time claimant's attorney necessarily expended, the factual situation presented, and the results obtained, the Appeals Board finds a reasonable attorney fee for the actual post-award matters addressed by claimant's attorney is \$250.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated September 19, 1996, entered by Administrative Law Judge John D. Clark should be, and hereby is, modified to award claimant attorney fees in the sum of \$250.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Wichita, KS
William L. Townsley, III, Wichita, KS
E. L. Lee Kinch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director